Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ANDY JAMES GILLILAN,
Petitioner

v.

TECCOR ELECTRONICS, INC.,
Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit incorrectly applied the *St. Mary's Honor Center v. Hicks* decision in holding that the district court's jury instruction on age discrimination was improper and grounds for vacating the judgment.

2. Whether the Fifth Circuit's ruling in this case results in a conflict among the circuits in the application of the Supreme Court's ruling in *St. Mary's.*

3. Whether the Fifth Circuit failed to consider the jury instruction as a whole when it found that the district court's instruction suggested to the jury that an employer is deemed to have engaged in age discrimination merely if the jury disbelieves the employer's explanation.

4. Whether the Fifth Circuit erred in vacating a jury verdict based on a portion of the instruction relating to pretext, where there was substantial direct evidence of age discrimination to support the verdict.

LIST OF PARTIES AND RULE 29.1 LIST

The parties before the court of appeals and this Court are listed in the caption. Teccor Electronics, Inc.'s parent companies are Ranco Incorporated of Delaware, Mitisubishi Materials Corporation and Siebe, Plc.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

Andy James Gillilan prays for a writ of certiorari to review the opinion and order of the United States Court of Appeals for the Fifth Circuit, rendered in these proceedings on March 31, 1994.

OPINIONS BELOW

The opinion of the court of appeals is unpublished. It is attached hereto (Petitioner's Appendix ("Pet. App.") at 1a). The Order of the Fifth Circuit denying Gillilan's Petition for Rehearing, issued on May 16, 1994, is unreported and is attached hereto. (Pet. App. at 5a). The Third Amended Final Judgment issued by the district court on June 8, 1993 is attached hereto (Pet. App. at 7a); the district court's Memorandum and Order issued on May 5, 1993 and is attached hereto (Pet. App. at 9a); the district court's Order issued on February 23, 1993 and is attached hereto (Pet. App. at 13a).

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) to review a decision of the United States Court of Appeals for the Fifth Circuit by writ of certiorari after rendering judgment. The decision for which review is sought was entered on March 31, 1994. Pet. App. at 1a. Pursuant to this Court's Rule 13.4, the time for filing a petition for certiorari runs from the date of the denial of a petition for rehearing. A Suggestion for Rehearing En Banc was timely filed, and was treated by the court as a petition for rehearing and was denied on March 16, 1994. Pet. App. at 5a.

STATUTES INVOLVED

Relevant portions of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 *et seq.* are set forth below:

§ 623

(a) Employer Practices

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

* * * *

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer—

* * * *

(1) to take any action otherwise prohibited under subsection (a) . . . . where

the differentiation is based on reasonable factors other than age . . . .

(3) to discharge or otherwise discipline an individual for good cause.

* * * *

STATEMENT OF THE CASE

A. Nature of the Case and Proceedings Below

In February, 1990, Andy James Gillilan, the facilities manager for Teccor Electronics, Inc., was terminated after nearly eight years of employment. At the time of his termination, Gillilan, whose date of birth is December 10, 1922, was 67 years old. After he was terminated he filed charges with the Equal Employment Opportunity Commission (EEOC) and subsequently filed a lawsuit on January 31, 1992 asserting his termination constituted a willful violation of the Age Discrimination in Employment Act (ADEA), 29 USC 621 *et seq.*[1]

The case was tried to a jury for five days from February 16-19, 1993 and continuing on February 22, 1993. At the trial Gillilan produced both direct evidence of age discrimination and evidence that Teccor's asserted reasons for the termination were pretextual.

On February 22, 1993 the jury entered its verdict, finding that age was a determining factor in Teccor's decision to fire Gillilan, but that Teccor did not willfully violate the ADEA or intentionally inflict emotional distress. By order dated February 23, 1993 (Pet. App. 13a) and Memorandum and Order dated May 5, 1993 (Pet. App. 9a), the district court addressed the issues reserved for the court. The district court denied the ERISA claims, found reinstatement not to be feasible and awarded front

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[1] Gillilan also asserted claims under the Employee Retirement Income Security Act of 1974 (ERISA) and claims of intentional and negligent infliction of emotional distress. The claim of negligent infliction was dropped before trial.

pay, awarded Gillilan his attorneys fees and costs and ordered a judgment entered in favor of Gillilan on his age claim. In the Memorandum and Order filed May 5, 1993 (Pet. App. 9a at 11a), the district court also denied Teccor's Motion to Amend Judgment or for New Trial. The district court entered its Third Amended Final Judgment on June 8, 1993. Teccor timely appealed the district court judgment [2], asserting that the trial court had erroneously instructed the jury on Gillilan's burden of proof in connection with his age discrimination claim and that the court erroneously admitted an exhibit which Teccor claimed was irrelevant and prejudicial.[3]

Without oral argument, the Fifth Circuit Court of Appeals issued a *per curiam* opinion on March 31, 1994. The opinion concluded that viewing the jury instruction as a whole, the charge misled the jury as to the substantive law. On the evidentiary issue, the court concluded that the district court had not abused its discretion. The district court judgment was vacated and the matter was remanded for further appropriate proceedings. Gillilan, in this petition, does not challenge the court of appeals' ruling on the evidentiary issue, only its ruling on the objection to the jury instruction.

B. Factual Background

Gillilan was hired at Teccor in May, 1982 by Bob Howard, then production manager, as a plant engineer. Gillilan worked for Howard, and then for Bill Rusk, when Rusk became production manager. Rusk was Gillilan's immediate supervisor from 1985 through August, 1989.

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[2] Gillilan did not appeal the dismissal of the ERISA and the intentional infliction claims.

[3] These were identical to the grounds asserted by Teccor in its Motion to Amend Judgment or for New Trial except that a third contention made to the district court, that there was insufficient evidence to support the jury verdict, was abandoned on appeal.

Rusk promoted Gillilan to facilities manager in 1986.[4] On September 5, 1989 Rusk was demoted to quality control manager and Sam Beard was hired to assume the production manager position. From September 5, 1989 until Gillilan's termination on February 8, 1990, Gillilan was supervised by Sam Beard.

While Gillilan was working for both Howard and Rusk, he received numerous merit increases and annual written evaluations which rated him "very good" to "excellent". Gillilan had a number of areas of responsibilities, including all facilities maintenance, security, safety and environmental reporting and auditing responsibilities. Although on a number of occasions Rusk sought approval to hire an assistant for Gillilan, these requests were denied. Rusk testified that Gillilan's performance was excellent.

Beginning in late 1987 or early 1988, Rusk had a number of conversations with General Manager Carl Prokesh (while Rusk was still Gillilan's supervisor), in which Prokesh said Gillilan was too old, was losing it and should be replaced by a younger man. Rusk recalled at least five separate conversations where Prokesh blamed problems at the facility on Gillilan's age and encouraged Rusk to replace Gillilan with a younger man. Repeatedly, Prokesh told Rusk that Gillilan was "losing it" and was too old. Rusk defended Gillilan's performance and refused to fire him.

Rusk also had a conversation with Prokesh shortly after Gillilan's termination. Prokesh said that Gillilan was too old for the job, Rusk should have fired him but wouldn't and so Prokesh had brought in someone who would.

Prokesh did admit to saying on at least one occasion, "Andy's losing it". Further, Rusk's testimony regarding

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[4] The court of appeals' decision incorrectly states that Gillilan was demoted to quality control manager, several months before his termination. Rusk, not Gillilan was demoted. Gillilan was never demoted from his position of facilities manager.

these conversations was supported by the fact that two other witnesses testified that Rusk contemporaneously had told them about his conversations with Prokesh.

At the time of his termination, Gillilan, at 67, was substantially older than any other Teccor manager and was replaced by a substantially younger (54 year old) man. In addition, there was testimony that no salaried employee has ever voluntarily retired from Teccor. Monty Webb, Vice President of Engineering was reported to have commented "We don't ever let anybody retire at Teccor".

According to Teccor's witnesses, Carl Prokesh, Myran Dill (Human Resources Manager) and Sam Beard met and made the determination to terminate Gillilan on January 23, 1990. On February 8, 1990, Dill and Beard met with Gillilan, told him he was being terminated and gave two reasons for his termination: that he had not replaced tile in the acid cleanup room and had not obtained a permit from the City of Irving to run conduit under Hurd street to join the old and new facility. When Gillilan tried to respond, Beard said he didn't want to argue and got up and left the meeting. Dill asked Gillilan if Beard had relayed any criticisms to him and whether he had given Gillilan any complaints in writing, and she appeared surprised when Gillilan said Beard had not done so. At the time Gillilan was terminated he reviewed his personnel file and found there was no written documentation of problems or criticisms in his file.

In the Fall of 1990, the parties met at the EEOC for a factfinding conference and Teccor produced a written memorandum which listed numerous complaints about Gillilan's performance. Neither the document nor the reasons set forth therein had been provided to Gillilan at anytime prior to the fact-finding conference (except for the two reasons stated by Beard at the termination interview). Apparently, Teccor did not feel secure enough with these justifications, and at trial there were additional

reasons added, not mentioned in the memorandum, including claims that Gillilan and his staff attended too many seminars, incurred too much overtime, and had spent too much money on tools in February-March, 1989.

According to Beard, he supervised Gillilan for only 3 1/2 to 4 months before he decided to terminate Gillilan and asked Dill to get candidates from a search firm for his replacement. Beard's notes, which he said he made to document the problems he had with Gillilan, do not begin until November 18, 1989. Beard admitted that he did not communicate the criticisms he listed in the memorandum presented at the EEOC fact-finding conference to Gillilan and that he did not counsel or discipline Gillilan or warn him he was facing termination.

Many of the problems which Teccor proffered as the legitimate, non-discriminatory reasons for terminating Gillilan were matters which were out of his control or which continued to occur under his replacement.

C. Ruling of the Fifth Circuit Court of Appeals

The Fifth Circuit in its *per curiam* opinion ruled that the district court erroneously suggested to the jury that an employer is deemed to have engaged in age discrimination merely if the jury disbelieves the employer's explanation for the firing of an employee. The Fifth Circuit presumed that the district court committed this "error" because it did not have the benefit of *St. Mary's Honor Center v. Hicks*, 509 U.S. ——, 113 S.Ct. 2742 (1993). (Pet. App. 1a).

The Fifth Circuit concluded that in *St. Mary's Honor Center, id.*, this Court held that a plaintiff has not proven discrimination merely because the fact finder has found that the employer's proffered reasons for termination were a pretext. Further, the Fifth Circuit cited with approval its own application of *St. Mary's* to ADEA cases, in *Bodenheimer v. PPG Industries*, 5 F.3d 955, 957 n.4 (5th Cir. 1993). (Pet. App. 3a).

The Fifth Circuit concluded that a portion of the instruction would have led the jury to believe that if an employer cannot provide legitimate reasons for termination, it has engaged in age discrimination "more likely than not."[5] The Fifth Circuit asserted that because of the preponderance of evidence standard, the jury may well have incorrectly reasoned that Teccor's proffered explanations were a pretext, that rejection of the proffered explanations meant that "more likely than not" Teccor had discriminated against Gillilan and that therefore Gillilan had established by a preponderance of the evidence that Teccor had engaged in age discrimination. (Pet. App. 4a).

The Fifth Circuit concluded that viewing the jury charge as a whole, the charge mislead the jury as to the substance of law. Based on the instruction, the Fifth Circuit vacated the judgment and remanded the case.

REASONS FOR GRANTING THE WRIT

There are special and important reasons for granting Gillilan's Petition for Writ of Certiorari. The Fifth Circuit misconstrued and erroneously applied *St. Mary's Honor Center v. Hicks, supra.* The Fifth Circuit's decisions in this case and in *Bodenheimer v. PPG Industries, Inc., supra,* upon which it relied in reaching its decision here, are in conflict with decisions in other circuit courts relating to the application of this Court's decision in the *St. Mary's* case.

Also, this petition should be granted because the Fifth Circuit decision is not consistent with well-settled precedent that a jury instruction should be read as a whole, and the appellate court should review jury instructions with deference and give wide latitude to the trial court. Based solely on a question regarding the pretext portion

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[5] A portion of the district court's charge, including the entire instruction on age discrimination is attached at Pet. App. 15a. The specific language the Fifth Circuit made reference to is noted at footnote 6, *infra.*

of the jury charge, the appellate court vacated the judgment and remanded a case in which there was both direct and indirect evidence of discrimination. This petition should be granted because the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision.

I. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS CONCERNING THE PROPER APPLICATION OF THE *ST. MARY'S HONOR CENTER v. HICKS* DECISION AND CORRECT THE FIFTH CIRCUIT'S ERRONEOUS INTERPRETATION OF THAT CASE.

The Fifth Circuit's decision in this case misapplies *St. Mary's supra*, and misinterprets this Court's ruling in that case. Although the Fifth Circuit's decision purports to be based upon *St. Mary's*, the practical effect of the decision undercuts the case and takes the Fifth Circuit out of step with other circuits who have properly applied *St. Mary's*. In *St. Mary's*, this Court stated that it disagreed with the Eighth Circuit's decision finding that *as a matter of law*, in every case where a plaintiff disproves the proffered reasons asserted by a defendant to support a discharge, the plaintiff automatically wins. However the Court clearly found the fact-finder *may*, in any given case, infer discrimination based on such a showing of pretext:

> "The fact-finder's disbelief of reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination. Thus, rejection of the employer's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, "no additional proof of discrimination is *required*." (emphasis in the original, citation omitted).

125 L.Ed.2d at 418-19.

This Court further explained in footnote 4 of the decision the permissive inference of the ultimate fact of intentional discrimination as follows:

> Contrary to the dissent's confusion-producing analysis, post, at —— U.S. ——, 125 L.Ed.2d, at 434-35 there is nothing whatever inconsistent between this statement and our later statements that (1) the plaintiff must show "*both* that the reason was false, *and* that discrimination was the real reason," . . . . . and (2) "it is not enough . . . . to disbelieve the employer" . . . . . Even though (as we say here) rejection of the defendant's proffered reason is enough at law to sustain a finding of discrimination, there must be a finding of discrimination.

Id. at 418-19.

In *St. Mary's*, this Court further clarified its meaning in its discussion of the statement in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 255 (1981) that the plaintiff's burden of proving pretext merges with the plaintiff's ultimate burden of proving discrimination:

> Surely a more reasonable reading is that proving the employer's reason false becomes part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination.

Id. at 422.

Thus, this Court clearly rejected the "pretext-plus" requirement that some of the circuit courts had previously applied.

In Gillilan, the Fifth Circuit objected to and found erroneous, a limited portion of the jury instruction on age discrimination wherein the district court explained to the jury the reason why they might infer discrimination

based upon a showing of pretext.[6] The Fifth Circuit objected to this portion of the instruction because, according to the appellate court, this language erroneously suggested to the jury that an employer is deemed to have engaged in age discrimination merely if the jury disbelieves the employer's explanation for firing an employee. The implication of the appellate court's decision is that this instruction misconstrues the law because in the Fifth Circuit's view, the plaintiff must show something more than simply negating the employer's defense.

The practical effect of the Fifth Circuit's decision in this case and in *Bodenheimer v. PPG Industries, Inc., supra*, which it relied upon in deciding this case, is to require "pretext plus."[7] This "pretext plus" requirement is not consistent with this Court's decision in *St. Mary's*.

Because of the Fifth Circuit's clearly erroneous interpretation of *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742 (1993), it has reversed a judgment entered upon a

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[6] The trial court explained in its instruction to the jury that the inference of discrimination could be drawn for this reason:

> The reason is that we know from experience that more often than not, people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for terminating a person from employment have been eliminated as possible reasons for an employer's actions, it is more likely than not that the employer, who we generally assume acts only with some reason, based its decision on an impermissible consideration such as age.

The Fifth Circuit objected to this language beginning with "when all legitimate reasons . . ." The Fifth Circuit failed to address the preface to the "more likely than not" language which it found offensive under *St. Mary's*. Ironically, when taken as a whole, the instruction is entirely consistent with *St. Mary's* and the explanation to the jury for "the reason" for the inference was obviously proper.

[7] In addition to *Bodenheimer, supra*, the Fifth Circuit has indicated this view in *Barrow v. New Orleans Steamship Ass'n*, 10 F.3d 292, 298 n.22 (5th Cir. 1994).

plaintiff's verdict in this ADEA case. This Court took painstaking efforts to insure that its decision that proof of pretext does not entitle the plaintiff to a verdict does not deprive the plaintiff of the possibility of prevailing if the factfinder concludes, even based solely on proof of pretext, that age more likely motivated the termination. The Fifth Circuit will not permit proof of age discrimination through circumstantial evidence (through the *McDonnell-Douglas/Burdine* proof scheme approved by this Court). In *Gillilan*, where direct and circumstantial evidence supported the verdict, the Fifth Circuit reversed for a new trial because the trial court went beyond instructing the jury that it may infer discrimination if it disbelieved the employer's explanation for the termination and also (correctly) instructed the jury as to *the reason* for this permissive inference.[8]

This is particularly important for purposes of review by this Court because the Fifth Circuit has also specifically ruled that *St. Mary's* stands for the proposition that to survive summary judgment, a plaintiff may not rely upon circumstantial evidence—that proof of pretext is insufficient and some direct evidence is required. *Bodenheimer v. PPG Indus.*, 5 F.3d 955, 957 n. 8 (5th Cir. 1993).

Thus, the Fifth Circuit, in great contrast to the stated purpose and intended effect of this Court in *St. Mary's*, is using *St. Mary's* as a basis for (a) abolishing jury trials based on circumstantial evidence (they cannot survive summary judgment) and (b) restraining trial courts from instructing (correctly) the jury as to the reason for the inference that can be drawn from proof of pretext.

The Fifth Circuit has twisted *St. Mary's* into a great "Catch 22." Jury trials where the plaintiff might prevail based on proof of pretext will not happen, because the Fifth Circuit uses *St. Mary's*, which permits a plaintiff to prevail based solely on proof of pretext, to require more than proof of pretext to survive summary judgment.

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[8] See the language quoted at footnote 6, *supra*.

If a plaintiff somehow survives summary judgment (perhaps because he, like Gillilan, also has direct evidence of discrimination), any effort to effectively use circumstantial evidence at trial is prevented, since the trial court cannot explain (correctly) to the jury the reason for the inference *St. Mary's* permits the jury to draw. Thus, the Fifth Circuit uses *St. Mary's* to eliminate successful claims of discrimination based on circumstantial evidence.

In contrast, other circuits have correctly applied this Court's holding in *St. Mary's*.[9] In these circuits a plaintiff can get to the factfinder and the factfinder *may* infer intentional discrimination based upon the plaintiff's *prima facie* case and proof that the asserted reasons were pretextual.

For example, the Second Circuit in *Saulpaugh v. Monroe Community Hospital, supra* at 141-42 stated:

> We emphasize that despite the dire warnings to the contrary, Justice Scalia soundly concluded that *Hicks* would not cause "[p]anic . . . . [t]o break out among the courts of appeals . . . ." In some instances, as Justice Scalia notes, a plaintiff may meet this ultimate burden of proof by combining her proof of the elements constituting a *prima facie* case with evidence that defendant's proffered reasons for its actions were false. Justice Scalia emphasizes that a factfinder's disbelief of a defendant's proffered rationale may allow it to infer the ultimate fact of intentional discrimination in some cases. (citations omitted).

Similarly, in *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120 (7th Cir. 1994), the court states:

> In our view, the holding in *Hicks* is that a plaintiff is not entitled to judgment as a matter of law simply

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[9] See e.g., *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993, as amended on January 26, 1994); *Nabola v. Chicago Transit Authority*, 10 F.3d 501 (7th Cir. 1993); *Hairston v. The Gainesville Sun Publishing Co.*, 9 F.3d 913 (11th Cir. 1993); *DeMarco v. Holy Cross High School*, 4 F.3d 166 (2nd Cir. 1993); and *Saulpaugh v. Monroe Community Hospital*, 4 F.3d 134 (2nd Cir. 1993), *cert. denied*, —— U.S. ——, 114 S.Ct. 1189 (1994).

> because she proves her *prima facie* case and shows that the employer's proffered reasons for her discharge are false. The next logical question is whether the plaintiff may prevail, not automatically as a matter of law, but through submission of her case to the ultimate factfinder, under such circumstances.
>
> *Hicks* answers this question in the affirmative. The court explicitly states that the plaintiff *may* prevail in a discrimination case by establishing a prima facie case and by showing that the employer's proffered non-discriminatory reasons for her demotion or discharge are factually false. This "will permit the trier of fact to infer the ultimate fact of intentional discrimination" "[N]o additional proof of discrimination is required." (citations and footnote omitted).

Finally, the Ninth Circuit in *Washington v. Garrett, supra* at 1433 stated:

> If a plaintiff succeeds in raising a genuine factual issue regarding the authenticity of the employer's stated motive, summary judgment is inappropriate, because it is for the trier of fact to decide which story is to be believed . . . . Because as *St. Mary's* recognizes, the factfinder in a Title VII case is entitled to infer discrimination from plaintiff's proof of *a prima facie* and showing a pretext without anything more, there will always be a question for the factfinder once a plaintiff establishes a *prima facie* case and raises a genuine issue as to whether the employer's explanation for its action is true.

The fact that the Fifth Circuit is erroneously interpreting *St. Mary's* means that plaintiffs in that jurisdiction are not even having an opportunity to present their case to a jury to allow the jury an opportunity to infer (if they will) discrimination from the fact issue concerning the falseness of the defendant's reasons. *Dailey v. Johnson & Johnson*, —— F.Supp. ——, 64 FEP Cases 1393 (N.D. Tex. 1994). And yet, as was strikingly pointed out by the district court in the *Dailey* case, although in the Fifth Circuit the plaintiff's case must be dismissed upon a mo-

tion for summary judgment, she had asserted sufficient facts to go to a jury in the Seventh Circuit or the Ninth Circuit (citing *Anderson v. Baxter Healthcare Corp., supra* and *Washington v. Garrett, supra.*). The court concludes that in light of *Bodenheimer* ". . . that absent a defendant stupid enough to make an outright admission of discrimination or a pattern of discrimination so obvious as to constitute evidence of discrimination, both of which are absent here, a plaintiff will be unable to survive summary judgment." 64 FEP Cases at 1396.

More often than not, as in the circumstances put forth by Judge Kendall in the quotation from *Dailey*, a plaintiff in an age discrimination case only has circumstantial evidence. The Fifth Circuit's misinterpretation of *St. Mary's* in essence deprives a great many plaintiffs of important federal statutory rights (rights under the ADEA). This Court should grant this writ to correct this serious conflict.

II. THE FIFTH CIRCUIT FAILED TO CONSIDER THE JURY INSTRUCTION AS A WHOLE, WHEN IT FOUND THAT THE DISTRICT COURT'S INSTRUCTION SUGGESTED TO THE JURY THAT AN EMPLOYER IS DEEMED TO HAVE ENGAGED IN AGE DISCRIMINATION MERELY IF THE JURY DISBELIEVES THE EMPLOYER'S EXPLANATION, AND VACATED A JUDGMENT WHICH WAS SUPPORTED BY SUBSTANTIAL DIRECT EVIDENCE OF AGE DISCRIMINATION.

The doctrine of harmless error expressed in Rule 61 of the Federal Rules of Civil Procedure is applicable to errors in instructions to the jury. The issue to be determined is whether substantial rights of a party were affected and this requires consideration of the instructions as a whole. See generally, Moore Federal Practice, § 61.09.

In the instant case, the Fifth Circuit took part of a sentence, in part of an instruction and read it out of context, in violation of well-established case law. As noted

in the prior section, *supra* at p. 11, n.6, the limited portion which the Fifth Circuit found objectionable must be read in the context of the jury instruction as a whole and, more particularly in the context of the two preceding sentences, taken together with the prefatory beginning of the quoted sentence, which the court omitted.[10]

This language does not necessarily instruct the jury that they must reach any conclusion. Rather, the last two sentences cited are explanatory in nature and simply explain how and why one *may* infer that Teccor was motivated by discriminatory reasons and intended to discriminate against Gillilan because of his age.

The language which the Fifth Circuit found objectionable comes directly from its own decision in *Thornbrough v. Columbus & Greenville Railroad Co.*, 760 F.2d 633, 640 (1985). Almost identical language is included in that decision in its discussion of the specific ways in which a plaintiff can carry his burden of proving intentional discrimination, by direct or indirect proof. Moreover, this language in *Thornbrough* actually is contained in a quote from this Court's decision in *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577, 98 S.Ct. 2943, 2950 (1978). This discussion regarding the fact that a plaintiff may carry his burden of proving intentional discrimination either by direct or indirect proof is still good law, if *St. Mary's Honor Center, supra*, is appropriately applied.

If, as Fifth Circuit precedent would require, the Fifth Circuit had truly read the jury instruction as a whole, rather than taking a partial sentence out of context, it is clear that the charge was correct, did not mislead the jury as to the substantive law and the judgment should have been affirmed. See *Martin v. Thomas*, 973 F.2d 449, 454 (5th Cir. 1992).

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[10] A portion of the district court's charge, including the entire instruction on age discrimination is attached at Pet. App. 15a.

The jury instruction, taken as a whole, permitted the jury to infer age discrimination if they disbelieved the proffered reason. Moreover, the instructions clearly advised the jury that the plaintiff has the burden of proving by a preponderance of the evidence that age was a determing factor in the plaintiff's termination. This ultimate issue and burden was reinforced by the first question propounded to the jury, that is "Do you find by a preponderance of the evidence that age was a determining factor in the defendant's decision to terminate Plaintiff's employment with Defendant?"

The Fifth Circuit erred in vacating the district court's judgment based upon a portion of the jury instruction relating to pretext, where there was substantial direct evidence of age discrimination to support the judgment. The Fifth Circuit's decision concluded that the district court judge erred with respect to that portion of the jury instructions which addressed pretext. In contrast to the facts in *Bodenheimer*, where the Fifth Circuit concluded that the plaintiff merely "proffered a meager collection of evidence consisting of one facially neutral comment and various legal conclusions" (*Bodenheimer, supra*, at 958-59), Gillilan did more than merely provide evidence to the jury that Teccor's proffered reasons for his termination were not credible. He also presented direct evidence from Bill Rusk (bolstered by the testimony of two other witnesses) that Gillilan was fired because Carl Prokesh said he was "too old", "losing it" and needed to be replaced by a "younger person". Therefore, in the instant case, the jury could have found age discrimination to exist based upon the direct evidence of discrimination, as well as the indirect evidence of "pretext" presented by Gillilan. Additionally, other circumstantial evidence, over and above evidence attacking the proffered reasons was presented, which could support an inference by the jury that age discrimination was a determining factor in Gillilan's termination. The fact that there was sufficient evidence to support the jury's verdict was tacitly acknowl-

edged by Teccor, when on appeal, it abandoned the issue of sufficiency of evidence to support the verdict, which it had raised in its motion to amend judgment or for new trial.

In its opening brief on appeal, Teccor tried to circumvent the fact that Gillilan in fact had presented substantial evidence of direct discrimination to the jury by citing *Walther v. Lone Star Gas Company*, 952 F.2d 119 (5th Cir. 1992) for the proposition that a verdict must be set aside if the jury is instructed it could rely on alternative grounds and one of those grounds is legally incorrect. The Fifth Circuit apparently was convinced by Teccor's arguments, since the court ignored the fact that there was direct evidence in this case. However, reliance on *Walther, supra* is misplaced. In Gillilan, the alternative grounds were not legally insufficient. Based on *St. Mary's Honor Center, supra*, finding discrimination based upon indirect circumstantial proof is a legally correct alternative, provided there is an inference of intentional discrimination which is drawn therefrom. Further, footnote 2 in *Walther*,[11] 952 F.2d at 126 is equally applicable to the instant case, because here too, the Gillilan jury was instructed to consider *all* the evidence. Pet. App. at 15a, 16a. As in *Walther, supra*, the jury's verdict should not have been reversed based upon objections to the instructions, simply because the jury might have decided on a ground that was supported by insufficient evidence, where the jury was instructed to consider all of the evidence.

Even if the jury instruction was somewhat deficient, under Fifth Circuit cases regarding review of jury instructions the judgment should not have been vacated. In *Martin v. Thomas, supra* at 454, the court held:

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[11] At footnote 2 the court stated:

> Indeed, the district court instructed the jury to find facts "in accordance with the preponderance of *all the evidence* in the case, both direct and circumstantial." This instruction mitigates the misleading effect of the instruction on statistics.

> "No harmful error is committed if the charge viewed as a whole correctly instructs the jury on the law, even though a portion is technically imperfect".[12]

In *Bomarito v. Penrod Drilling Corporation*, 929 F.2d 186, 189-96 (5th Cir. 1991), the court indicated that an inadequate instruction merits reversal *only* when the charge *as a whole* leaves the reviewing court with substantial and eradicable doubt whether the jury has been properly guided in its deliberations. Mere differences in form or emphasis in the jury instruction do not constitute reversible error. The appellate court should review jury instructions with great deference and give wide latitude to the trial court.[13]

In this case, the jury instruction (taken as a whole) permitted, but did not require the jury to infer age discrimination if they disbelieved the proffered reason. Further, the instructions clearly advised the jury that the plaintiff had the burden of proving by preponderance of the evidence that age was a determining factor in the plaintiff's termination. This ultimate issue and burden was reinforced by the first question propounded to the jury. (Pet. App. 20a). Not only did Gillilan produce evidence to disprove and question the credibility of Teccor with respect to its proffered reasons, but there was also direct evidence of age discrimination and other circumstantial evidence upon which the jury could have relied in order to conclude that there was intentional discrimination. The jury was also advised that an em-

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[12] Similarly, in a recent Second Circuit case decided post-*St. Mary's* that court held: "while we agree . . . that a portion of the charge . . . was erroneous, we think that the charge as a whole properly apprised the jury that the plaintiff bore the burden of establishing discrimination. The jury charge repeatedly made clear the plaintiff's burden . . . ." *Carbrera v. Jakobovitz*, 24 F.3d 372, 383 (2nd Cir. 1994).

[13] *FDIC v. Wheat*, 970 F.2d 124, 130-31 (5th Cir. 1992); *Treadway v. Society Anonyme Louis-Dreyfus*, 894 F.2d 161, 167-68 (5th Cir. 1990).

ployer does not violate the ADEA unless it bases its decision concerning an employee on that employee's age, that they were not to decide whether Teccor's decision was a fair or wise one, but the only question they were to consider was whether Gillilan's age motivated Teccor's decision to terminate his employment. They were further advised that an employer is entitled to terminate persons for subjective business judgments or any other reason that is not discriminatory. The jury was cautioned that if they found that Gillilan was terminated for reasons unconnected with age, even if they thought the reasons were incorrect, unfair, harsh or insensitive, that they must find that Teccor had not violated the ADEA. Further, in instructing the jury as to what Gillilan had to prove, the jury was told that he was entitled to prove, if he could, that the reason stated by Teccor for its decision to terminate his employment were not its true reasons but were instead pretextual, to cover up age discrimination prohibited by the ADEA. (Pet. App. 18a-19a). Thus, it is clear that the jury was made fully aware of the fact that while they could infer discrimination indirectly from circumstantial evidence, they must find age was a determining factor. The jury had before it sufficient evidence to find discrimination based on either direct and/or indirect evidence. In these circumstances, the Court should exercise its supervisory powers to correct the court of appeals' erroneous ruling.

CONCLUSION

For all of the reasons stated herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 15, 1994

APPENDIX

APPENDIX

[Filed May 31, 1994]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1616

Summary Calendar

ANDY JAMES GILLILAN,
Plaintiff-Appellee,

versus

TECCOR ELECTRONICS, INC.,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas

(3:92-CV-0208-P)

Before GARWOOD, SMITH, and DEMOSS, Circuit Judges.

PER CURIAM:

The district court, presumably because it did not have the benefit of *St. Mary's Honor Ctr. v. Hicks,* 113 S. Ct. 3743 (1993), erroneously suggested to the jury that an employer is deemed to have engaged in age discrimination merely if the jury disbelieves the employer's explanation for the firing of an employee.

I.

Gillilan, a facilities manager at Teccor, was demoted to quality control manager in 1989 and fired five months later. He filed suit against Teccor, alleging that he was dismissed because of his age in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634.[1] Over Teccor's objection, the court submitted the following instruction to the jury:

> To prevail on his age discrimination claim, therefore, Mr. Gillilan must prove that his age was a determining factor in Teccor's decision to terminate his employment.
>
> . . .
>
> Mr. Gillilan is entitled to prove, if he can, that the reasons stated by Teccor for its decision to terminate his employment were not its true reasons but were instead pretextual, to cover up age discrimination prohibited by the ADEA. He may do this in either of two ways: (1) directly, by persuading you that a discriminatory reason more likely than not motivated Teccor, or (2) indirectly, by showing that Teccor's explanation is not credible or believable. If he succeeds in proving to you that Teccor's stated reasons for terminating his employment were pretextual, you may infer that Teccor was motivated by discriminatory reasons and intended to discriminate against Mr. Gillilan because of his age. The reason is that we know from experience that more often than not, people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when

[1] Gillilan also alleged that his firing violated the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001-1461, and constituted intentional and negligent infliction of emotional distress. Gillilan abandoned his negligent infliction claim before trial. The jury rejected Gillilan's intentional infliction claim. By separate order, the court rejected Gillilan's ERISA claim.

> all legitimate reasons for terminating a person from employment have been eliminated as possible reasons for an employer's actions, *it is more likely than not* that the employer, who we generally assume acts only with *some* reason, based its decisions on an impermissible consideration such as age. [First emphasis added.]

The jury answered yes to the question, "Do you find by a preponderance of the evidence that age was a determining factor in the Defendant's decision to terminate Plaintiff's employment with Defendant?" In accordance with the verdict, the district court awarded damages against Teccor.

On appeal, Teccor claims that the jury instuctions were erroneous and that the district court erred by admitting certain evidence regarding a Teccor memorandum that described Gillilan's job deficiencies. Specifically, the district court admitted into evidence a computer printout showing that the "file creation date" of the Teccor memorandum was after Gillilan's firing. A Teccor employee, Rusk, testified about the meaning of the file creation date.

II.

In *St. Mary's Honor Ctr.*, the Court held that a plaintiff has not proven discrimination merely because the factfinder has found that the employer's proffered reasons for termination were a pretext. The Court said that

> nothing in law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action was not believable.

Id. at 2751. Although *St. Mary's* was a title VII case involving race discrimination, this court has adopted the *St. Mary's* framework in ADEA cases. *Bodenheimer v. PPG Indus.*, 5 F.3d 955, 957 n. 4 (5th Cir. 1993).

The jury instructions, taken as a whole, do not comport with *St. Mary's*. The district court was correct in

instructing that Gillilan must prove that age was a determining factor in his termination. The court was also correct in instructing that the jury may infer determination if it disbelieved Teccor's explanation for the termination. *St. Mary's,* 113 S. Ct. at 2749.

The district court erred, though, when it instructed that

> when all legitimate reasons for terminating a person from employment have been eliminated as possible reasons for the employer's actions, it is more likely than not that the employer, who we generally assume acts only with some reason, based its decision on an impermissible consideration such as age.

This instruction would have led the jury to believe that if an employer cannot provide legitimate reasons for termination, it has engaged in age discrimination "more likely than not." Because a plaintiff who proves a claim "more likely than not" would satisfy the preponderance-of-evidence standard, the jury well may have incorrectly reasoned that Teccor's proffered explanations were a pretext, that rejection of Teccor's proffered explanations meant that "more likely than not" Teccor had discriminated against Gillilan, and that therefore Gillilan had established by a preponderance of the evidence that Teccor had engaged in age discrimination.

Viewing the jury charge as a whole we conclude that the charge misled the jury as to the substantive law. *See Martin v. Thomas,* 973 F.2d 449, 454 (5th Cir. 1992). On the evidentiary issue, we conclude that the district court did not abuse its discretion in deciding that the jury should be able to see the evidence in question. The defendant had every opportunity to develop, through cross-examination or otherwise, the significance of the file creation date.

The judgment is VACATED and REMANDED for further appropriate proceedings.

[Filed May 16, 1994]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1616

ANDY JAMES GILLILAN,
Plaintiff-Appellee,

versus

TECCOR ELECTRONICS, INC.,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas

ON SUGGESTIONS FOR REHEARING EN BANC

(May 16, 1994)

Before GARWOOD, SMITH and DEMOSS, Circuit Judges.

PER CURIAM:

(✔) Treating the suggestions for rehearing en banc as petitions for panel rehearing, it is ordered that the petitions for panel rehearing are DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local

Rule 35), the suggestions for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

Judge Higginbotham did not participate in the consideration of the suggestion for rehearing en banc.

[Filed Jun. 8, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

3:92-CV-0208-P

ANDY JAMES GILLILAN,
Plaintiff,

v.

TECCOR ELECTRONICS, INC.,
Defendant.

THIRD AMENDED FINAL JUDGMENT

This civil action was tried to a jury, which returned its verdict. Having considered the applicable law and the jury's findings, the Court orders and adjudges as follows:

Plaintiff be awarded $155,000.00 in back-pay damages against Defendant, and that costs be taxed against Defendant Teccor Electronics, Inc.

The Court finds that reinstatement of the Plaintiff is not feasible, and that an award of front pay is appropriate. Plaintiff is awarded $49,776.98 in front-pay damages.

That Plaintiff be awarded $43.380.00 in attorney fees and $3,680.62 in costs.

That Plaintiff be awarded an additional $1,462.00 in attorney fees for an additional 6.5 hours expended subsequent to the submission.

All relief not expressly granted by this judgment is hereby denied.

Post judgment interest is awarded at the rate of 3.54% from the date of entry of this judgment.

SO ORDERED this 8th day of June, 1993.

/s/ Jorge A. Solis
JORGE A. SOLIS
United States District Judge

[Filed May 5, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

3:92-CV-0208-P

ANDY JAMES GILLILAN,
Plaintiff,

v.

TECCOR ELECTRONICS, INC.,
Defendant.

MEMORANDUM OPINION AND ORDER

Before the court are Plaintiff's Motion to Correct Clerical Error or Mistake in Judgment, or Alternatively, Motion for Supplemental Judgment, Defendant's Motion to Amend Judgment or for New Trial, Plaintiff's Application for Attorneys Fees and Costs, and each party's response to these motions.

On February 23, 1993, the court entered final judgment for Plaintiff in this case, pursuant to a jury's verdict, on his claims pursuant to the Age Discrimination in Employment Act (ADEA). The judgment awarded Plaintiff back pay damages in an amount that had been stipulated by the parties.

On the same date, the court entered an Order denying Plaintiff's claims pursuant to the Employee Income Retirement Security Act (ERISA) and directing that a final judgment be entered. However, neither the final judgment nor the order entered by the court addressed the issue of reinstatement or front pay damages for the

Plaintiff. Plaintiff's Motion to correct this oversight was filed on March 25, 1993. Defendant responds that the motion is untimely filed under rule 59(e) Fed. R. Civ. Proc., and that it is not proper as a rule 60 motion, Fed. R. Civ. Proc.

Rule 60(a), allows correction of a mistake in a judgment or order arising from oversight or omission. This may be done by the court "at any time of its own initiative or on the motion of any party". Rule 60(b)(1) allows a party relief from a final judgment or order resulting from mistake or inadvertance. In this case, the failure to address the issue of reinstatement or front pay was clearly a result of oversight, omission, mistake, and inadvertence by the court. The parties had in fact stipulated as to the amount of front pay damages in the event that the court found that reinstatement was not feasible. It is the responsibility of the court to make a determination whether reinstatement is feasible in an ADEA case. *Walther v. Lone Star Gas Co.*, 952 F.2d 119 (5th Cir. 1992). If reinstatement is not feasible, then the court must determine if front pay is appropriate, and if so, the amount to be awarded. *Id.*

The Plaintiff's Motion to Correct Clerical Error or Mistake in Judgment is therefore granted.

The court finds, under the evidence in the case, that reinstatement is not feasible, and that front pay is appropriate. Front pay is usually appropriate when a plaintiff is discharged in violation of the ADEA and not reinstated by the court. *Reneau v. Wayne Griffin & Sons, Inc.*, 945 F.2d 869 (5th Cir. 1991). No reason has been advanced by the Defendants in this case as to why front pay would not be appropriate. Plaintiff will, therefore, be awarded front pay damages in an amount of $49,776.98, which is the amount stipulated by the parties. An amended final judgment will issue to correct the oversight error by the court in the original final judgment.

Defendant's Motion to Amend Judgment or for New Trial is denied. Defendant's grounds are an evidentiary objection and an objection to the court's charge to the jury. Both of these objections were made and considered at trial, and they were overruled by the court. Defendant's last ground is that the jury verdict is against the great weight of the evidence. There was evidence before the jury which would have allowed a verdict for either party. The jury chose to go with the Plaintiff, and there was evidence before them to support that verdict.

Attorneys Fees

Plaintiff has filed an application requesting $43,380.00 in attorneys fees and $3,680.62 for out of pocket expenses. Plaintiff has attached a schedule itemizing and explaining the time spent on the case. Plaintiff has also submitted affidavits with an analysis of the *Johnson* factors and addressing the reasonableness of the hourly rate charged and the amount of time spent working on the case.

Defendant responds that since Plaintiff prevailed on only one of his four claims, he should only recover part of the requested attorneys fees. Defendant requests the court to reduce Plaintiff's requested fees by twenty percent.

The court finds that Plaintiff prevailed on his primary theory of the case. Most of the evidence introduced at trial went to the issue of age discrimination. Additionally, the court would note that it is amending its final judgment to reflect an award of front pay damages to Plaintiff in the amount of $49,776.98. Based on the affidavits submitted by Plaintiff and the court's knowledge of the case, the court finds that an hourly rate of $225.00 per hour is a reasonable charge in this case. The court also finds that the number of hours spent working on the case is reasonable. Plaintiff's total recovery in this case

is almost $205,000.00. The attorneys fees requested amount to a little over 20% of the recovery and is not unreasonable.

SO ORDERED.

SIGNED this 5th day of May, 1993.

/s/ Jorge A. Solis
JORGE A. SOLIS
United States District Judge

[Filed Feb. 23, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

3:92-CV-0208-P

ANDY JAMES GILLILAN,
Plaintiff,

v.

TECCOR ELECTRONICS, INC.,
Defendant.

ORDER

On February 15, 1993, the above-styled case was called for trial before a jury. Plaintiff's complaint alleged claims for violations of the Age Discrimination in Employment Act ("ADEA"), intentional infliction of emotional distress, and violations of the Employee Income Retirement Security Act (ERISA). The claims for ADEA violations and intentional infliction of emotional distress were submitted to the jury, and the claim under ERISA was submitted to the Court.

After hearing the evidence and argument of counsel, the Court finds for the Defendant on the ERISA claim.

Plaintiff alleges that he was fired from his job at Teccor Electronics, Inc., where he held the position of facilities manager, because Teccor wanted to prevent him from accruing or receiving benefits under the company's health and pension plans. Plaintiff was 67 years old at the time of his termination on February 9, 1990.

In relation to the health plans, the evidence showed that the Defendant's plans paid claims of over $3,000,000.00

in 1988 and 1989. Plaintiff's claims each of those two years were approximately $2,500.00. There was no showing that Plaintiff was experiencing such health problems as would entail great expenditures in the years after his termination. Plaintiff testified that he was in relatively good health, and had intended to keep working until the end of July, 1993.

In relation to the pension plan, the evidence showed that Plaintiff was vested at the time of his retirement, and is currently being paid from the pension plan. The evidence also showed that Plaintiff's successor was hired at the same salarly as Plaintiff was making, so the Defendant's contributions to the plans were not affected by Plaintiff's termination. Also, undisputed testimony was that the pension plan has been overfunded for several years.

The Court therefore finds that Plaintiff has not shown by a preponderance of the evidence that he was discharged or otherwise discriminated against by Defendant in violation of ERISA, 29 U.S.C. § 1140.

The jury found for the Plaintiff on his ADEA claim, and based on the parties' stipulation as to the amount of damages, judgment will be entered for Plaintiff in the amount of $155,000.00 with costs taxed against the Defendant.

Requests for attorney's fees are to be submitted in compliance with Local Rule 12.2.

SO ORDERED.

SIGNED this 23rd day of February, 1993.

/s/ Jorge A. Solis
JORGE A. SOLIS
United States District Judge

[Filed Feb. 22, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

3:92-CV-0208-P

ANDY JAMES GILLILAN,
Plaintiff,

v.

TECCOR ELECTRONICS, INC.,
Defendant.

COURT'S CHARGE TO THE JURY

MEMBERS OF THE JURY:

Now that you have heard all of the evidence, it becomes my duty to give you the instructions of the court concerning the law applicable to this case.

It is your duty as jurors to follow the law as I shall state it to you, and to apply that law to the facts as you find them from the evidence in the case. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by me.

* * * *

* * * Both the parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by the Court in these instructions, and reach a just verdict regardless of the consequences.

* * * *

Generally speaking, there are two types of evidence which a jury may consider in properly finding the truth as to the facts in this case. One is direct evidence—such as testimony of an eyewitness. The other is indirect or circumstantial evidence—the proof of a chain of circumstances which points to the existence or nonexistence of certain facts. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts from a preponderance of all the evidence, both direct and circumstantial.

So, while you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case.

Now, I have said that you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or "believability" of each witness and the weight to be given to his testimony. In weighing the testimony of a witness, you should consider his relationship to the plaintiff or to the defendant; his interest, if any, in the outcome of the case; his manner of testifying; his opportunity to observe or acquire knowledge concerning the facts about which he testified; his candor, fairness and intelligence; and the extent to which he has been supported or contradicted by other credible evidence. You may, in short, accept or reject the testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying as to the existence or nonexistence of any fact. You may find that the testimony of a smaller number of witnesses as to any

fact is more credible than the testimony of a larger number of witnesses to the contrary.

* * * *

PLAINTIFFS' CONTENTIONS

Plaintiff, Andy James Gillilan, alleges that Defendant Teccor willfully violated the Age Discrimination in Employment Act ("ADEA"), when it terminated him in February of 1990. Plaintiff asserts also that Defendant's conduct constituted intentional infliction of emotional distress.

DEFENDANT'S CONTENTIONS

Defendant Teccor denies that the Plaintiff was terminated because of his age. Rather, Defendant contends that the separation from employment of the Plaintiff, was promoted by legitimate, non-age related reasons.

* * * *

February 22, 1993

/s/ Jorge A. Solis
JORGE A. SOLIS
United States District Judge

* * * *

PLAINTIFFS' CLAIMS

Age Discrimination

The Plaintiff claims that Teccor violated the Age Discrimination in Employment Act (hereafter referred to as the "ADEA"). The ADEA provides, in pertinent part, that:

> (a) It shall be unlawful for an employer:
>
> (1) . . . to discharge any individual or otherwise discriminate against any individual with respect to his . . . terms, conditions, or privileges of employment, because of such individual's age[.]

The ADEA prohibits discrimination in the basis of age against any employee who is at least 40 years old. The purpose of the ADEA is to insure that employers do not make employment decisions concerning older workers based on their age. The law does not, however, require employers to give older employees more favorable or special treatment, as compared to their younger counterparts, because of their age or length of service. The age of a "protected employee" (i.e., one at least 40 years of age) then, is accorded neutral status under the ADEA, neither facilitating nor hindering his employment, his chances for advancement, or his exposure to demotion or discharge.

Not every adverse action affecting an employee at least 40 years of age is unlawful discrimination. The ADEA also provides that:

> It shall not be unlawful for an employer to take any action otherwise prohibited . . . where the [action] is based on reasonable factors other than age.

Stated another way, an employer does not violate the ADEA unless it bases a decision concerning an employee on that employee's age.

To prevail on his age discrimination claim, therefore, Mr. Gillilan must prove that his age was a determining factor in Teccor's decision to terminate his employment. He need not show that age was the only factor upon which Teccor acted, but he must prove that age was a determining factor that caused Teccor to discharge him. A determining factor is one which made a difference in Teccor's decision. The issue before you is not whether Teccor's decision was a fair or a wise one; the only question you are to consider is whether Mr. Gillilan's age motivated Teccor's decision to terminate his employment. An employer is entitled to terminate persons for subjective business judgments or any other reason that is not discriminatory. If you find that Mr. Gillilan was terminated for reasons unconnected with age, even if you think the reasons were incorrect, unfair, harsh or insensitive, then you must find that Teccor has not violated the ADEA.

In this case, there is no dispute that Mr. Gillilan was within the protected age group at the time Teccor terminated his employment. Teccor contends, however, that Mr. Gillilan was terminated from employment because of poor job performance.

Mr. Gillilan is entitled to prove, if he can, that the reasons stated by Teccor for its decision to terminate his employment were not its true reasons but were instead pretextual, to cover up age discretion prohibited by the ADEA. He may do this in either of two ways: (1) directly, by persuading you that a discriminatory reason more likely than not motivated Teccor, or (2) indirectly, by showing that Teccor's explanation is not credible or believable. If he succeeds in proving to you that Teccor's stated reasons for terminating his employment were pretextual, you may infer that Teccor was motivated by discriminatory reasons and intended to discriminate against Mr. Gillilan because of his age. The reason is that we know from experience that more often than not, people

do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for terminating a person from employment have been eliminated as possible reasons for the employer's actions, it is more likely than not that the employer, who we generally assume acts only with *some* reason, based its decision on an impermissible consideration such as age.

QUESTION NO. 1

Plaintiff has the burden of proof on this question by a preponderance of the evidence.

Do you find by a preponderance of the evidence that age was a determining factor in the Defendant's decision to terminate Plaintiff's employment with Defendant?

Answer "YES" or "NO."

ANSWER: Yes

If you answered "Yes" to Question No. 1 then go to the instruction preceding Question No. 2 and answer Question No. 2. Otherwise, go to the instruction preceding No. 3 and answer Question No. 3.

* * * *

CERTIFICATE

We, the jury, have answered the above and foregoing questions as herein indicated, and herewith return same into court as our verdict.

DATE: 2/22/93

By: /s/ [Illegible]
Presiding Officer of the Jury